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In the
Supreme Court of the United States

OCTOBER TERM, 2002

LARRY A. OLIVER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED

At a court-martial, must the United States prove that the accused was subject to the Uniform Code of Military Justice at the time of the offense?

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PETITION FOR WRIT OF CERTIORARI

Larry A. Oliver petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in his case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces in *United States v. Oliver*, 57 M.J. 170 (C.A.A.F. 2002), is reproduced in Appendix A at 1a-9a. The opinion of the United States Navy-Marine Corps Court of Criminal Appeals, 55 M.J. 763 (N-M. Ct. Crim. App. 2001), is reproduced in Appendix B at 10a-30a.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on August 22, 2002. He invokes this Court's jurisdiction under 28 U.S.C. § 1259(3) (2000).

STATUTE INVOLVED

Article 132 of the Uniform Code of Military Justice, 10 U.S.C. § 932, provides:

§ 932. Art. 132. Frauds against the United States

Any person subject to this chapter—
(1) who, knowing it to be false or fraudulent—
(A) makes any claim against the United States or any officer thereof; or
(B) presents to any person in the civil or military service thereof, for approval or payment, any claim against the United States or any officer thereof;
(2) who, for the purpose of obtaining the approval, allowance, or payment of any claim against the United States or any officer thereof—
(A) makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;
(B) makes any oath to any fact or to any writing or other paper knowing the oath to be false; or
(C) forges or counterfeits any signature upon any writing or other paper, or uses any such signature

knowing it to be forged or counterfeited;
(3) who, having charge, possession, custody, or control of any money, or other property of the United States, furnished or intended for the armed forces thereof, knowingly delivers to any person having authority to receive it, any amount thereof less than that for which he receives a certificate or receipt; or
(4) who, being authorized to make or deliver any paper certifying the receipt of any property of the United States furnished or intended for the armed forces thereof, makes or delivers to any person such writing without having full knowledge of the truth of the statements therein contained and with intent to defraud the United States;
shall, upon conviction, be punished as a court-martial may direct.

STATEMENT OF THE CASE

I. Statement of the Facts

At the time of his court-martial, Petitioner was a staff sergeant in the United States Marine Corps Reserve. He was charged with three specifications of violating Article 132 of the Uniform Code of Military Justice (UCMJ), which prohibits frauds against the United States, "on or about 29 September 1997." Article 132 provides, "*Any person subject to this chapter* . . . [who engages in certain frauds against the United States] shall, upon conviction, be punished as a

court-martial may direct." UCMJ art. 132, 10 U.S.C. § 932 (2000) (emphasis added). Yet, as the Navy-Marine Corps Court of Criminal Appeals found, "the Government did not present any direct and persuasive evidence of personal jurisdiction over the appellant on the charged date of 29 September 1997." App. at 16a. The court-martial nevertheless convicted him of violating Article 132.

On appeal, Petitioner challenged his conviction, arguing that at his court-martial, the United States bore an affirmative duty to prove that he was subject to the UCMJ at the time of the offense. Both the Navy-Marine Corps Court of Criminal Appeals and the Court of Appeals for the Armed Forces disagreed. *See* App. at 6a, 16a. Relying on information presented on appeal but not before the court-martial, both courts found that Petitioner was, in fact, subject to the UCMJ at the time of the offense. App. at 7a, 16a-17a.

II. Proceedings Below

Petitioner was tried by a special court-martial composed of officer and enlisted members. On May 13, 1998, contrary to his pleas, he was found guilty of three specifications of fraud against the United States in violation of Article 132 of the UCMJ. The members sentenced him to thirty days of confinement, reduction to the lowest enlisted rank, and a bad-conduct discharge. On February 8, 1999, the officer who convened the court-martial approved the sentence as adjudged and, with the exception of the bad-conduct discharge,

ordered it executed.

On September 28, 2001, the Navy-Marine Corps Court of Criminal Appeals dismissed the finding of guilty to one of the three specifications as multiplicious with another, but otherwise affirmed the findings and sentence. *United States v. Oliver*, 55 M.J. 763 (N-M. Ct. Crim. App. 2001); App. at 10a-30a. The Court of Appeals for the Armed Forces granted review and, on August 22, 2002, affirmed. *United States v. Oliver*, 57 M.J. 170 (C.A.A.F. 2002); App. at 1a-9a.

REASONS FOR GRANTING THE PETITION

THE COURT OF APPEALS FOR THE ARMED FORCES FAILED TO RECOGNIZE AND APPLY THE CONGRESSIONALLY-ESTABLISHED METHOD OF LIMITING COURTS-MARTIAL TO THEIR PROPER JURISDICTION.

I. Introduction

This case concerns the method by which court-martial jurisdiction is limited to those properly subject to military law. Since the Military Justice Act of 1983[1] extended certiorari jurisdiction over the Court of Appeals for the Armed Forces' decisions, this Court has

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[1] P.L. 98-208, 97 Stat. 1393 (codified as amended at 28 U.S.C. § 1259(3); 10 U.S.C. § 867a (2000)).

on several occasions reviewed cases of fundamental importance to the military justice system.[2] This is another such case.

Courts-martial are tribunals with limited jurisdiction. With certain narrow, congressionally-prescribed exceptions discussed below, they may exercise jurisdiction over only those who are subject to the UCMJ at the time of trial who committed an offense at a time when they were also subject to the UCMJ.

These jurisdictional limits are necessary because those tried by court-martial are not entitled to some of the bedrock constitutional rights that protect their civilian counterparts. Chief among these is the right to be tried by a randomly-selected jury of their peers. *See Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (the "right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions"). The accused at a court-martial is instead tried before a court-martial panel hand-picked by the officer who convened the court or before a military judge.

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[2] *See, e.g., Solorio v. United States*, 483 U.S. 435 (1987) (holding that an offense's connection to military service is not necessary to establish a court-martial's subject matter jurisdiction); *Weiss v. United States*, 510 U.S. 163 (1994) (upholding the method by which military judges are appointed and rejecting a challenge to their service without fixed terms of office); *Loving v. United States*, 517 U.S. 748 (1996) (upholding the President's adoption of aggravating factors to narrow the class of those eligible for the military death penalty).

In the Department of the Navy, these military judges—unlike their civilian counterparts—are not protected by fixed terms of office. *See Weiss*, 510 U.S. 163. In light of these and other limitations on the Bill of Rights' applicability to the military justice system, the jurisdiction of courts-martial is tightly constrained.[3]

Limiting courts-martial to their appropriate jurisdiction is particularly important for members of the armed forces' reserve components, such as Petitioner. While reservists "are subject to the Code during periods of inactive-duty training and during periods of active duty," they "at all other times are not subject to the Uniform Code of Military Justice." *United States v. Chodara*, 29 M.J. 943, 944 (A.C.M.R. 1990) (footnotes and citations omitted). As the United States military relies more heavily on its 1.25 million reserve and National Guard personnel, determining when these citizen soldiers are and are not subject to court-martial jurisdiction will become increasingly important.

Congress, as the Branch with the primary responsibility to make rules for the regulation of the armed forces,[4] has set out a statutory structure that

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[3] *See, e.g., Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (prohibiting courts-martial from trying military dependents during peacetime); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960) (prohibiting courts-martial from trying military employees during peacetime).

[4] U.S. Const., art. I, § 8, cl. 14.

effectively limits courts-martial to their proper jurisdiction. Unfortunately, the Court of Appeals for the Armed Forces not only failed to give effect to that statutory structure, but failed even to recognize it. This Court should grant the petition to give effect to Congress's clear intent.

II. The UCMJ's Plain Language Requires the United States to Prove that the Accused Was Subject to the UCMJ at the Time of the Offense.

Congress has limited court-martial jurisdiction in two ways. First, Articles 18, 19, and 20 of the UCMJ specify that courts-martial "have jurisdiction to try persons subject to this chapter." 10 U.S.C. §§ 818, 819, 820 (2000). The plain language of these articles focuses on jurisdiction at the time of trial. Each of the UCMJ's fifty-seven articles establishing substantive offenses further limits court-martial jurisdiction by specifying the class of individuals to whom the article applies. *See* UCMJ arts. 81-134; 10 U.S.C. §§ 881-934.

Forty-eight UCMJ articles, including Article 132, are limited to those "subject to this chapter." Three—fraudulent enlistment, aiding the enemy, and spying—apply more broadly to "[a]ny person" who commits the prohibited act. UCMJ arts. 83, 104, 106, 10 U.S.C. §§ 883, 904, 906. The remaining six apply to subsets of those persons subject to the UCMJ. Desertion and absence without leave are limited to "member[s] of the armed forces," thereby excluding those non-military personnel—such as retirees—who fall within Article 2's

definition of persons subject to the UCMJ. UCMJ arts. 85(a), 86, 10 U.S.C. §§ 885(a), 886. The offense of contempt toward officials is limited to commissioned officers. UCMJ art. 88, 10 U.S.C. § 888. The offense of insubordinate conduct toward a warrant officer, noncommissioned officer, or petty officer is limited to warrant officers and enlisted members. UCMJ art. 91, 10 U.S.C. § 891. The offense of misbehavior of a sentinel is limited to sentinels and lookouts. UCMJ art. 113, 10 U.S.C. § 913. Finally, conduct unbecoming an officer and gentleman is limited to commissioned officers, cadets, and midshipmen. UCMJ art. 133, 10 U.S.C. § 933.

The UCMJ's drafters were mindful that military status sometimes is—and sometimes is not—a prerequisite for an offense. For example, Department of Defense Assistant General Counsel Felix Larkin testified:

> [W]here [Article 77, which sets out the law of principals,] says "any person punishable under this code who commits an offense punishable," that seems to be redundant. But we consciously did it that way rather than saying "any person subject to this code who commits an offense punishable," because spies are not otherwise subject to this code.

Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm., 81st Cong., 1st Sess., at 1240 (1949). During the Senate hearings on the UCMJ, one witness criticized the introductory language of Articles 104 (aiding the enemy) and 106 (spying), noting that the drafters' construction

would subject civilians to those offenses. *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 2498 Before a Subcomm. of the Senate Armed Services Comm.*, 81st Cong., 1st Sess., at 127 (1949) (testimony of Colonel P. G. McElwee). Congress did not modify that language. Thus, the UCMJ's drafters quite deliberately chose to limit some, but not all, military offenses to "any person subject to" the UCMJ.

Article 132's introductory phrase, "Any person subject to this chapter," clearly reflects a congressional intent to limit the article's reach to those on active duty at the time of the offense. The phrase's placement in the article and the UCMJ's entire structure indicate that it is an element of the offense.

Consider the case of a civilian who knowingly makes a false claim against the government. Such a person would not be subject to court-martial jurisdiction and thus could not be tried for an Article 132 offense. Even more fundamentally, not only can the civilian not be *tried* for violating Article 132, but the civilian *has not violated* Article 132, which by its own terms applies only to those who are subject to the UCMJ at the time of the offense. Accordingly, status under the UCMJ is essential to prove an Article 132 offense. The United States, of course, has an obligation to prove all essential elements of an offense beyond a reasonable doubt. *See* UCMJ art. 51, 10 U.S.C. § 851. Absent proof that the accused was subject to the UCMJ when he or she committed a fraud against the United States, there can be no conviction under Article 132.

This plain meaning of the phrase, "Any person subject

to this chapter" was recognized by a military appellate decision within the first half decade of the UCMJ's operation. In *United States v. Gibson*, 17 C.M.R. 911 (A.F.B.R. 1954), the Air Force Board of Review discussed the requirements for a finding of guilty to an Article 118(2) (unpremeditated murder) offense, whose introductory phrase is identical to Article 132's. *See* 10 U.S.C. § 918(2). The board noted that a finding of guilty to unpremeditated murder "*must be supported by proof that an accused person subject to the Code*, without justification or excuse, and with an intent to kill, unlawfully killed a human being." 17 C.M.R. at 923 (emphasis added). The plain meaning of Article 132's introductory phrase today is no different than the plain meaning of Article 118's introductory phrase forty-eight years ago.

This plain meaning is dispositive. The first step in statutory interpretation—and, if it is conclusive, the only step—is to examine "the language of the statute itself." *United States v. Ron Pair Enters.*, 489 U.S. 235, 241 (1989). If "the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Id.* (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

The conclusion that language such as Article 132's introductory phrase constitutes an element of the offense is hardly novel. This Court has examined similar language in a federal civilian criminal statute prohibiting supplemental compensation of Government employees' salary and determined that the "text of § 209(a) . . . indicates that employment status is an element of the

offense." *Crandon v. United States*, 494 U.S. 152, 159 (1990) (construing 18 U.S.C. § 209). Similarly, the text of Article 132 indicates that military status is an element of the offense.

Even if the plain language were not dispositive, the rule of lenity would require than any ambiguity in Article 132's language be resolved in the accused's favor. The rule of lenity is well-established under both this Court's precedent and military appellate case law. *See, e.g., Liporata v. United States*, 471 U.S. 419, 427-28 (1985) (relying on rule of lenity to find *mens rea* requirement for food stamp fraud offense); *see also Crandon*, 494 U.S. at 158, 168 (relying on rule of lenity to find temporal limitation on statute barring private parties from paying government employees supplemental compensation); *United States v. Miller*, 47 M.J. 352, 357 (C.A.A.F. 1997). Article 132's plain language clearly permits a construction requiring the United States to prove the accused was subject to the UCMJ at the time of the offense. Indeed, the fact that two intermediate military appellate decisions have indicated that the United States is affirmatively required to make such a showing suggests that such an interpretation is not merely possible, but reasonable. *See Gibson*, 17 C.M.R. at 923; *Chodara*, 29 M.J. 943. Thus, the application of basic canons of statutory construction yields the conclusion that Congress intended to require the United States to prove the accused's military status at the time of the offense.

Unfortunately, in its consideration of this issue, the Court of Appeals for the Armed Forces failed to

perceive Congress's clear intent. Remarkably, the court maintained that "the beginning language of Article 132—'any person subject to this chapter'—does not establish an element of the offense but, rather, sets forth the baseline for jurisdiction under the UMCJ *common to all offenses*." App. at 7a (emphasis added). The court appeared not to recognize that Congress used language other than "any person subject to this chapter" to define the class of those subject to nine of the UCMJ's substantive offenses. Article 104 (aiding the enemy), for example, applies to "any person," while Article 88 (contempt toward officials) applies only to "any commissioned officer." Thus, the language "any person subject to this chapter" is not common to all offenses.

The court then noted that "[h]istorically, the Manuals for Courts-Martial have not treated the 'any person subject to this chapter' language as an element of the offense." App. at 7a. However, the lower court itself has held that the *Manual for Courts-Martial* is "not binding on this Court in fulfilling our responsibility to interpret the elements of substantive offenses—at least, those substantive crimes specifically delineated by Congress in Articles 77 through 132 of the Code." *United States v. Mance*, 26 M.J. 244, 252 (C.M.A. 1988); *accord United States v. Davis*, 47 M.J. 484, 486 (C.A.A.F. 1998). That view is surely correct. The "determination of what elements constitute a crime" is a question of "statutory construction." *United States v. Gaudin*, 515 U.S. 506, 525 (1995) (Rehnquist, C.J., concurring). Construing statutes is "the quintessential judicial function." *Bureau of Alcohol, Tobacco &*

Firearms v. Federal Labor Relations Auth., 464 U.S. 89, 98 n.8 (1983). Thus, the court should have focused on Congress's language in the UCMJ rather than on the *Manual for Courts-Martial*'s view of elements.

Even if the *Manual* were relevant, the court below should have noted that for Articles 88 (contempt toward officials), 91 (insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer), and 113 (misbehavior of sentinel or lookout), the *Manual* treats the Article's introductory phrase as an element of the offense. *See* Manual for Courts-Martial, United States, pt. IV, ¶¶ 12.b.(1), 15.b.(1)(a), 15.b.(2)(a), 15.b.(3)(a), 38.b.(1) (2000 ed.). A similar approach is warranted for the forty-eight articles that apply only to those subject to the UCMJ. The only three UCMJ offenses for which the accused's status at the time of the offense is not properly treated as an element are those that apply to "any person." UCMJ arts. 83, 104, 106, 10 U.S.C. §§ 883, 904, 906.

This Court should grant the petition to determine when the United States must affirmatively prove military jurisdiction at the time of the offense. Doing so will give effect to the congressional design to carefully limit the circumstances in which a citizen may be tried by court-martial rather than a civilian tribunal.

CONCLUSION

For the foregoing reasons, this Honorable Court should grant the petition for writ of certiorari.

Respectfully submitted,

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November 2002

APPENDIX A

UNITED STATES, Appellee,
v.
Larry A. OLIVER, Staff Sergeant, U.S. Marine Corps Reserve, Appellant.
No. 02-0084.
Crim.App. No. 200000659.
Argued May 1, 2002.
Decided Aug. 22, 2002.

For Appellant: *Lieutenant Colonel Dwight H. Sullivan,* USMCR (argued); *Commander George F. Reilly,* JAGC, USN (on brief).
For Appellee: *Commander Paul Jones,* JAGC, USNR (argued); *Colonel R.M. Favors,* USMC (on brief); *Lieutenant Jason A. Lien,* JAGC, USNR.

Chief Judge CRAWFORD delivered the opinion of the Court.

Appellant was tried by a special court-martial composed of officer and enlisted members and, contrary to his pleas, was found guilty of three specifications of fraud against the United States, in violation of Article 132, Uniform Code of Military Justice (UCMJ), 10 USC § 932. Specification 2 of the Charge failed to allege that appellant was on active duty at the time of the offense. The other two specifications alleged appellant committed the offenses while on active duty. All three specifications alleged that appellant's criminal activity

transpired "on or about 29 September 1997."

The convening authority approved the sentence of a bad-conduct discharge, confinement for thirty days, and reduction to E-1. The Navy-Marine Corps Court of Criminal Appeals accepted the Government's concession that Specifications 1 and 2 were multiplicious and dismissed Specification 1, affirmed the findings of guilty of the remaining two specifications, and upon reassessment, affirmed the adjudged and approved sentence. 55 MJ 763, 772 (2001). We granted review of the following issue:

> WHETHER, IN A CONTESTED COURT-MARTIAL OF A RESERVIST, THE GOVERNMENT MUST PROVE SUFFICIENT FACTS TO ESTABLISH SUBJECT MATTER JURISDICTION OVER THE ALLEGED OFFENSE.

We hold that appellant was subject to military jurisdiction.

FACTS

Appellant, a member of the Marine Corps Reserve, had a total of about 18 years of combined active and reserve service as of the date of trial. On August 25, 1997, he reported for a period of active duty at Camp Lejeune, North Carolina. That duty was to continue until September 27, 1997. Appellant checked into the Bachelor Enlisted Quarters (BEQ) on August 25 and stayed there until September 7. On September 11, he checked back into the BEQ and remained there until September 29.

On September 29, 1997, appellant filed a travel

claim for his period of active duty. The Court of Criminal Appeals found the following with respect to the travel claim:

> In doing so, he claimed $1,888.00 for lodging expenses and attached a supporting receipt indicating that he stayed at a nearby hotel from 23 August until 11 September. It was apparent that the computer-generated hotel receipt had been altered by hand in several significant aspects: the middle initial of the name of the patron was written as "A," the month of arrival was written as "Aug," the date of departure was written as "11 Sept," and the room rate was written as "1888.00." Thus, as altered, the receipt indicated that a Laurence A. Oliver from York, PA stayed at the hotel from 23 August 1997 until 11 September 1997 and incurred charges totaling $1,888.00. The receipt was also computer-printed with this notation: "(DUPLICATE)." Prosecution Exhibit 6, page 1.
>
> Officials at the disbursing office reviewed the claim package and notified the Naval Criminal Investigative Service (NCIS) of these apparent irregularities. Special Agent Ball was assigned to the investigation. He testified that during an interrogation of 28 October 1997, he advised the appellant that he was suspected of forgery, false official statement and fraud, advised him of his rights and obtained a waiver. During the subsequent conversation, the appellant admitted that: (1) he was on active duty, (2) he did not stay

at the hotel, (3) he made the marks on the hotel receipt, and (4) ... he submitted the travel claim. He also explained that the marks on the receipt were a mistake. When asked if he would put that information in writing, the appellant refused, and asked to speak to a lawyer. The interrogation ended at that point.

A front desk manager from the hotel testified that a *Lawrence T. Oliver* stayed there for three nights in June 1997 but that, after checking their records for the last two years, a Larry *A. Oliver* had never stayed there. She also testified that hotel employees don't normally write on the receipts, but that if they do, they would always initial that handwriting. In response to a member's question, she added that the hotel does not ask for identification if somebody requests a copy (or duplicate) of a receipt. If somebody asks for a receipt copy, one is provided.

55 M.J. at 765-66.

At the beginning of the trial, the trial counsel represented to the court that the charges were properly referred. When the judge asked if appellant had been "involuntarily extended on active duty," the trial counsel noted that appellant was on "medical hold" and would not "be allowed to terminate his active duty" until the medical problems cleared up. There was no objection or clarification by the defense. During his opening statement, the trial counsel asserted that appellant was "a reservist who had been on active duty orders...." The defense counsel also admitted in his opening statement

that appellant was on active duty and "continues on active duty as a reservist here today."

Corporal Nichole M. Martin testified that when a reservist comes on active duty and government quarters and meals are not provided, he or she is entitled to full per diem. In this case, appellant was authorized full reimbursement until September 30, 1997.

Unchallenged medical documentation submitted on appeal in response to appellant's jurisdictional challenge indicates that appellant was extended on active duty past September 28, 1997, for medical observation and treatment, and that this extension continued well past September 29, 1997.

During his closing argument, the prosecutor argued that appellant was on active duty at least up until October 28, 1997. This was not contradicted by any evidence at trial.

DISCUSSION

> The Constitution grants to Congress the power "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8, cl. 14. Exercising this authority, Congress has empowered courts-martial to try servicemen for the crimes proscribed by the UCMJ[.]

Solorio v. United States, 483 U.S. 435, 438, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987). Such a trial requires both *in personam* and subject matter jurisdiction, in addition to a properly constituted, *see, e.g., United States. v. Schneider*, 38 MJ 387, 393 (CMA 1983), and referred court-martial. Article 2, UCMJ, 10 USC § 802,

addresses subject matter jurisdiction, and Article 2(a)(1) indicates that servicemembers such as appellant, who are "lawfully called or ordered into, or to duty in or for training in, the armed forces," are subject to jurisdiction. RCM 204(b)(1), Manual for Courts- Martial, United States (2000 ed.), [FN1] provides that a "reserve component" servicemember who is "on active duty prior to arraignment" is subject to court- martial jurisdiction.

FN1. This provision is identical to the one in effect at the time of appellant's court-martial.

Appellant's jurisdictional argument rests on his belief that his status as an individual subject to court-martial jurisdiction is an element of Article 132, *supra.* However, the beginning language of Article 132—"[a]ny person subject to this chapter"—does not establish an element of the offense but, rather, sets forth the baseline for jurisdiction under the UCMJ common to all offenses. Historically, the Manuals for Courts-Martial have not treated the "[a]ny person subject to this chapter" language as an element of the offense. Similarly, the Military Judges' Benchbook, Dept. of the Army Pamphlet 27-9 (1 April 2001 and 30 Sept. 1996), does not include such an instruction. This longstanding practice underscores the fact that Congress set forth the "any person" language as a basic jurisdictional prerequisite, not as an element of a particular offense or offenses that are not peculiarly military.

Jurisdiction is an interlocutory issue, to be decided by the military judge, with the burden placed on the Government to prove jurisdiction by a preponderance of the evidence. *See United States v. McDonagh*, 14 MJ

415, 422, 424 (CMA 1983) (Everett, C.J.; Cook, J., concurring in part); *see also United States v. Laws*, 11 MJ 475, 476-77 (CMA 1981) (Cook, J.; Everett, C.J., concurring in the result); *see also* 1 Francis A. Gilligan and Fredric I. Lederer, *Court-Martial Procedure* § 2-52.10 at 85 (2d ed.1999)("the government has the burden of proving jurisdiction on a preponderance basis").

When appellant challenged the jurisdiction of the court-martial at the Court of Criminal Appeals, the Government recognized its burden and filed a Motion to Attach appellant's medical records to demonstrate that he was continued on active duty in a "medical hold" status beyond the expiration of his active duty orders. Medical hold is a valid reason for extending the active duty of a reservist, or any servicemember, and entitles him or her to the full pay and benefits of being on active duty. *See In the Matter of First Lieutenant Larry R. Hughes, USMCR,* 567 Comp.Gen. 451 (1978); Peiffer v. United States, 96 Ct.Cl. 344, 10 USC § 1074a(a); DoD Dir. 1241.1, Reserve Components Incapacitation Benefits (Dec. 3, 1992); SECNAVINST 1770.3C, Management and Disposition of Incapacitation and Incapacitation Benefits for Members of Navy and Marine Corps Reserve Components (Apr. 3, 2002). The medical records submitted clearly indicate that appellant was retained on active duty beyond the expiration of his orders and, therefore, establish that the court-martial possessed subject matter jurisdiction over the offense.

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

SULLIVAN, Senior Judge (concurring in the result):

Preliminarily, I note that the premise of appellant's argument in this case is that his status as a person subject to the Uniform Code of Military Justice at the time of the offense was an element of the offense for which he was found guilty. *See United States v. McDonagh*, 14 MJ 415, 422 (CMA 1983) (Everett, C.J.); *United States v. Ornelas*, 2 USCMA 96, 6 CMR 96 (1952). No legal authority has been provided for appellant's premise, but instead, it is based on his view of language in Article 132, UCMJ. His view of this statute is not supported by the President's explanation of this offense in paragraph 58, Part IV, Manual for Courts-Martial, United States (1998 ed.), and paragraph 211, Manual for Courts-Martial, United States, 1969 (Rev. ed.) and 1951, nor by our case law. *See United States v. Steele*, 2 USCMA 379, 9 CMR 9 (1953); *United States v. Perry*, 45 M.J. 339 (1996); *cf. United States v. Prentiss*, 256 F.3d 971, 981-85 (10th Cir. 2001).

With regard to the substance of the jurisdictional issue before us, my view is that the undisputed facts in the record decide this case. Trial counsel, defense counsel, and appellant all clearly indicated on the record that appellant was a reservist on active duty (by reason of a medical hold) at the time of the offenses and at the time of the trial. (R. 42, 99, 101, 189, 191- 92) Accordingly, this record was sufficient to establish court-martial jurisdiction. *See United States v. Wilson*, 53 MJ 327, 329-30 (2000); *United States v. Self*, 13 MJ

132, 135 (CMA 1982; *see generally United States v. Meadows*, 13 MJ 165, 168 n. 4 (CMA 1982). The post-trial evidence submitted by the Government, and uncontroverted by appellant, reaffirms this point.

APPENDIX B

**IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL
APPEALS
WASHINGTON NAVY YARD
WASHINGTON D.C.**

BEFORE

**D.A. ANDERSON C.J. VILLEMEZ
C.A. PRICE**

UNITED STATES

v.

**Larry A. OLIVER
Staff Sergeant (E-6), U.S. Marine Corps Reserve**

PUBLISH

NMCM 200000659 Decided 28 September 2001

Sentence adjudged 13 May 1998.
Military Judge: C.R. Zelnis.
Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, II MarineExpeditionary Force Augmentation Command Element (MACE), Camp Lejeune, NC.

CAPT MARK F. SULLIVAN, JAGC, USNR, Appellate Defense Counsel
LT JAMES E GRIMES, JAGC, USNR, Appellate Government Counsel

PRICE, Judge:

The appellant was tried on various dates in March, April, and May of 1998, by a special court-martial composed of officer and enlisted members. Contrary to his pleas, he was convicted of making a false claim, presenting a false claim, and using an altered lodging receipt in support of that same claim, in violation of Article 132, Uniform Code of Military Justice, 10 U.S.C. § 932. The approved sentence was confinement for 30 days, reduction to E-1 and a bad-conduct discharge.

We have examined the record of trial, the assignments of error, and the Government's response. Except as noted below, the findings and sentence are correct in law and fact and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Facts

The appellant is a member of the Marine Corps Reserve with a total of about 18 years of combined active and reserve service as of the date of trial. On 25 August 1997, he reported for a period of active duty at Camp Lejeune, North Carolina that was to continue until

27 September 1997. On that same day, he checked into the Bachelor Enlisted Quarters (BEQ), where he stayed until 7 September. On 11 September, he checked back into the BEQ and remained there until 29 September.

On 29 September 1997, he filed a travel claim for his period of active duty. In doing so, he claimed $1,888.00 for lodging expenses and attached a supporting receipt indicating that he stayed at a nearby hotel from 23 August until 11 September. It was apparent that the computer-generated hotel receipt had been altered by hand in several significant aspects: the middle initial of the name of the patron was written as "A," the month of arrival was written as "Aug," the date of departure was written as "11 Sept," and the room rate was written as "1888.00." Thus, as altered, the receipt indicated that a Lawrence A. Oliver from York, PA stayed at the hotel from 23 August 1997 until 11 September 1997 and incurred charges totaling $1,888.00. The receipt was also computer-printed with this notation: "(DUPLICATE)." Prosecution Exhibit 6 at 1.

Officials at the disbursing office reviewed the claim package and notified the Naval Criminal Investigative Service (NCIS) of these apparent irregularities. Special Agent Ball was assigned to the investigation. He testified that during an interrogation on 28 October 1997, he advised the appellant that he was suspected of forgery, false official statement, and fraud. The appellant was advised of his rights and he waived them. During the subsequent conversation, the appellant admitted that: (1) he was on active duty, (2) he did not stay at the hotel, (3) he made the marks on the hotel

receipt, and (4) that he submitted the travel claim. He also explained that the marks on the receipt were a mistake. When asked if he would put that information in writing, the appellant refused, and asked to speak to a lawyer. The interrogation ended at that point.

A front desk manager from the hotel testified that a *Lawrence T. Oliver* stayed there for three nights in June 1997 but that, after checking their records for the last two years, a *Larry A. Oliver* had never stayed there. She also testified that hotel employees don't normally write on the receipts, but that if they do, they would always initial their handwriting. In response to a member's question, she added that the hotel does not ask for identification if somebody requests a copy (or duplicate) of a receipt. If somebody asks for a receipt copy, one is provided.

Lack of Jurisdiction

The appellant contends that the Government "failed to demonstrate any factual basis for the exercise of subject matter jurisdiction" over the submission of the travel claim in question. Appellant's Brief of 16 Mar 2001 at 15. He explains that, under the terms of the appellant's orders, his active duty ended on 27 or 28 September 1997, depending on whether one day of travel time is included. Since the evidence consistently established that, as charged, the claim was made and presented, and the receipt submitted, on **29 September** 1997, the appellant argues that he was not on active duty

on the date of the alleged offenses. He concludes that the alleged false claim was submitted by an individual who, at the time, was not subject to the UCMJ.

The Government responds that an averment of jurisdiction was made by the prosecution, without objection, and that the Government therefore had no obligation to affirmatively prove jurisdiction. It also asserts that various medical documents show that the appellant, in fact, was extended on active duty on 28 September 1997 for medical observation and treatment, and that this extension of active duty continued well past the date of arraignment. [FN1]

> FN1. We granted a Motion to Attach various documents from the appellant's medical records that reflect treatment on and after 20 September 1997, as well as an undated memorandum by Gunnery Sergeant Utz, Administrative Chief for the appellant's command, pertaining to his medical-hold status.

In the trial counsel's opening statement, he referred to the appellant as "a reservist who had been on active duty orders," and said that the evidence would show that the appellant admitted that he "was on active duty." Record at 99-100. In the opening statement of the trial defense counsel (TDC), we note that he conceded that the appellant was on active duty from 23 August until 27 September 1997 and that "he continues on active duty as a reservist here today." *Id.* at 101. Notwithstanding these opening statements, we find that the Government did not present any direct and persuasive evidence of personal jurisdiction over the appellant on the charged

date of 29 September 1997.

It is black-letter law that, for a court-martial to have jurisdiction in a particular case, the offense(s) charged must be subject to court-martial jurisdiction. RULE FOR COURTS-MARTIAL 201(b)(5), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.). This is commonly referred to as "subject matter jurisdiction." To the extent permitted by the Constitution, special courts-martial may try any offense under the Code. Arts. 18, 19, UCMJ; R.C.M. 203; *See United States v. Solorio*, 483 U.S. 435 (1987).

Likewise, it is beyond cavil that a court-martial must also have jurisdiction over the accused service-member. R.C.M. 201(b)(4). This is commonly referred to as "personal" or "in personam" jurisdiction. A court-martial has jurisdiction over all persons subject to the UCMJ. Art. 17(a), UCMJ; R.C.M. 202(a). A reservist is subject to the Code when "lawfully called or ordered into, or to duty in or for training in, the armed forces." Art. 2(a)(1), UCMJ.

We view the appellant's initial reference to **subject matter** jurisdiction as an allusion to the actual issue of **personal** jurisdiction that he ultimately addresses. Any complaint that this court-martial lacks subject matter jurisdiction is totally without merit.

We now turn our attention to the real issue of personal jurisdiction. The first question that arises is: In the absence of any motion or objection, must the prosecution routinely prove personal jurisdiction over a reservist in its case-in-chief? We have not been cited to any reported case or other authority on point, nor can we

find any such authority. Thus, this appears to be an issue of first impression.

In a case addressing other personal jurisdiction issues, our superior Court said: "*since the void enlistment issue was raised in appellant's testimony at trial*, the Government had an affirmative obligation to establish jurisdiction over him." *United States v. Russo*, 1 M.J. 134, 137 (C.M.A. 1975)(emphasis added); *see United States v. Stubbs*, 3 M.J. 630, 632 (N.C.M.R. 1977). This language suggests that, if the issue is *not* raised at trial, the Government does not have an affirmative obligation to prove personal jurisdiction. In both of these cases, the servicemember was a member of the regular branch of his service. We do not believe that there should be any difference in the prosecution of a reservist. We, therefore, hold that the prosecution must only prove personal jurisdiction over an accused reservist when the accused raises the issue at trial. In this case, in its opening statement, the Government asserted that the appellant was on active duty and that he had admitted the same during an interrogation. Once the defense conceded the issue in its opening statement, the issue was moot at trial.

However, this does not end our inquiry, since lack of jurisdiction may be raised for the first time on appeal. R.C.M. 905(e); *see United States v. Reid*, 46 M.J. 236, 240 (1997). We note that, on 20 September 1997, while still on active duty, the appellant sought treatment for a medical condition. The examining physician placed him on light duty and scheduled a follow-up examination a few days later. The appellant was officially placed on

medical hold on 28 September 1997. The appellant's light-duty status continued until December 1997, when he was placed on a Limited Duty Board status for six months. Thus, we find that the appellant's active duty that commenced on 25 August 1997 continued, without interruption, through the date of arraignment, and for that matter, the date of sentencing in this court-martial. This active-duty status conferred personal jurisdiction upon the court-martial. The assignment of error has no merit.

Evidence of Invoking Article 31 Rights

The appellant next contends that he was materially prejudiced when the trial counsel elicited testimony from the NCIS agent that he had refused to sign a written statement and asked to see a lawyer. He also asserts that the military judge's failure to give a curative instruction exacerbated the impact of the error. The Government concedes that an obvious error occurred when the agent so testified, but argues that the appellant suffered no prejudice.

As stated earlier, the appellant told Special Agent Ball that he was on active duty, that he submitted a false travel claim and that he altered the hotel receipt. Special Agent Ball further testified that these admissions were made after the appellant was advised of his rights but before he declined to sign a written statement and asked for a lawyer. There was no objection by the TDC to this line of questioning; the military judge was likewise silent. In his instructions on findings, the military judge

failed to give a curative instruction. There was no objection or request for instruction from the TDC.

When the accused fails to object, at trial, to the erroneous admission of evidence, he must establish, on appeal, that plain error occurred. The general test for plain error is that: (1) an error occurred, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right. *United States v. Kho*, 54 M.J. 63, 65 (2000). We accept the Government's concession that this was obvious error. To persuade us that this error resulted in prejudice, the appellant must show that the error "had an unfair prejudicial impact on the jury's deliberations." *United States v. Riley*, 47 M.J. 276, 279 (1997)(quoting *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986)); *United States v. Ibarra*, 53 M.J. 616, 618-19 (N.M.Ct.Crim.App. 2000). In assessing whether such prejudicial impact actually occurred, we must consider all of the circumstances surrounding the admission of this objectionable evidence. *United States v. Sidwell*, 51 M.J. 262, 265 (1999); *Ibarra*, 53 M.J. at 620.

In our analysis, we are impressed with the following facts: (1) the agent testified that the appellant made the critical admissions before invoking his rights; (2) the members did not question the witness; (3) the trial counsel did not attempt to exploit this testimony in his arguments on findings; and most importantly, (4) the Government's other evidence of guilt was overwhelming. We find that the appellant was not prejudiced by the erroneous admission of this testimony. Although a curative instruction from the military judge

should have been given, the failure to do so was not prejudicial.

Motion for Continuance to Obtain Civilian Counsel

The appellant complains that the military judge abused his discretion in denying the appellant's request for a continuance to accommodate a civilian attorney's schedule. We disagree.

At the first Article 39(a), UCMJ, session of 2 March 1997, the appellant said that he was trying to hire a Mr. Taylor to represent him and that he did not expect to hire any other attorney. Record at 5-6. The military judge advised the appellant that, if he did retain Mr. Taylor, he must make Mr. Taylor aware of the 16 April trial date as well as earlier deadlines for discovery, witness requests, etc. *Id.* at 6. The appellant said he understood. The military judge reinforced this advice with the warning that the dates were "immovable" and that Mr. Taylor must be prepared to appear, as scheduled. *Id.*

At the next Article 39(a), UCMJ, session of 3 April, the appellant revealed that he had retained a Mr. Minor, then dismissed him. There was no mention of Mr. Taylor. *Id.* at 13. Through his military counsel, the appellant then moved for a continuance until 30 April to allow more time to find a civilian counsel and prepare for trial. *Id.* Despite the Government's objection, the military judge granted the motion and advised the appellant to diligently seek civilian representation. *Id.* at 15. The judge specifically advised the appellant not to expect "a favorable hearing on any further delays in this

case." The appellant indicated he understood. *Id.* at 16. The judge also gave the appellant a final warning:

> We will hold a 39(a) session on the 28th of April. At that date, I expect all defense counsel to be present in court. Staff Sergeant Oliver, it will be in your own best interest not to hire an attorney if he cannot be available to show up on the 28th of April or, obviously, on the 30th of April and 1 May, the dates of the trial.

Id. at 17.

The next Article 39(a), UCMJ, session was held on 30 April. The appellant was absent due to physical inability to appear. In discussing the appellant's absence, the trial counsel declined to press for a determination of voluntary absence and trial *in absentia*, explaining that "none of the witnesses are here at any potential expense," and conceded that the Government would not be prejudiced by a continuance. *Id.* at 24. The trial was postponed until 12 May.

On 12 May, the appellant appeared for trial. However, the TDC made a second motion for a continuance. *Id.* at 29. He explained that the appellant had formed an attorney-client relationship with a Mr. Wood, but that he was not immediately available for trial. *Id.* at 34. After some further discussion and a brief recess, the TDC advised the judge that the appellant apparently was confused about the civilian attorney's last name. In fact, the appellant wished to retain a Mr. Holmes of Virginia Beach, Virginia, and had discussed the case with Mr. Holmes. *Id.* at 37. Mr. Holmes was willing to represent the appellant if the

appellant could pay his retainer fee. Assuming that he would be paid in the near future, Mr. Holmes could be prepared to try the case as early as the week of 8 June, or thereafter. *Id.* at 38. The trial counsel then objected vehemently to any further continuance. However, when the military judge asked the trial counsel how the Government would be prejudiced by a continuance, the trial counsel said that the witnesses were local and he was not sure about their availability in the future. *Id.* at 38-41. After hearing testimony about the appellant's pretrial restriction and whether that restricted status impinged upon the appellant's ability to find and retain civilian counsel, the military judge heard further argument and denied the defense motion. *Id.* at 54-56. In ruling on the motion, the judge entered detailed findings of fact, then concluded that the requested continuance would be an unreasonable delay of the trial.

A military judge should grant a continuance in order to allow an accused a reasonable opportunity to obtain civilian counsel for trial. *United States v. Miller*, 47 M.J. 352, 358 (1997). But, the exercise of the right to civilian counsel "cannot operate to unreasonably delay the progress of the trial." *United States v. Thomas*, 22 M.J. 57, 59 (C.M.A. 1986)(citing *Morris v. Slappy*, 461 U.S. 1 (1983)). The test is abuse of discretion, even where failure to grant a continuance would deny an accused the right to a civilian counsel. *Miller*, 47 M.J. at 358. Some relevant factors we may use to determine whether the judge abused his discretion are: surprise, timeliness of the request, length of continuance, previous continuance requests, and use of reasonable

diligence by the moving party. *Id.*

The appellant did not, and could not reasonably, claim surprise. The record shows that he and his military counsel were adequately notified well in advance of each scheduled trial date. The motion for a continuance was not timely, having been made the same morning that trial was to start. The length of the continuance was never specified, but the appellant apparently would have accepted a postponement until June 8, when his requested counsel would have been available. This would have resulted in a delay of nearly one month. The appellant had already been granted one previous continuance for nearly one month in order to obtain civilian counsel. Whether the appellant used reasonable diligence to obtain civilian counsel was an issue the judge did not squarely address in his findings and conclusion. Our own review of the record fails to convince us that the appellant was reasonably diligent. During the nearly 75 days that elapsed between arraignment and trial, the appellant had ample opportunities to find and retain counsel. If he encountered difficulty beyond his own ability to resolve, we note that he did not ask his military counsel for assistance. Record at 31, 55. Although the appellant hints in his brief that this was because of some difficulty in his attorney-client relationship with his TDC, such a complaint was never made at trial.

We find that the military judge did not abuse his discretion. There was a rational basis to conclude that any further delay would be unreasonable, given all the facts and circumstances. The assignment of error is

without merit.

Ineffective Assistance of Counsel

The appellant next complains that he was deprived of the effective assistance of counsel because his TDC: (1) "turned on" him in litigating the motion for a continuance, (2) failed to object to an NCIS report on handwriting and fingerprint analysis of the travel claim package, (3) failed to object to the admission of testimony and a document showing that the appellant had invoked his rights, and (4) failed to object to multiplicity and unreasonable multiplication of charges. We disagree.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard for reviewing claims of ineffective assistance of counsel on appeal. The court stated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

> Unless a defendant makes both showings, it cannot be said that the conviction. . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687. This same standard has been adopted by the Court of Appeals for the Armed Forces in reviewing appellate claims of ineffective assistance of counsel. *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). Counsel are presumed to be competent in the performance of their representative duties. *United States v. Cronic*, 466 U.S. 648, 658 (1987). Moreover, we will "strongly presume that counsel has provided adequate assistance." *United States v. Russell*, 48 M.J. 139, 140 (1998)(quoting *Strickland*, 466 U.S. at 690). Thus, in order to demonstrate ineffective assistance of counsel, an appellant "must surmount a very high hurdle." *United States v. Smith*, 48 M.J. 136, 137 (1998)(quoting *United States v. Moulton*, 47 M.J. 227, 229 (1997)).

We first address the appellant's complaint that his TDC "turned on" him during the litigation of the second motion for a continuance. During the 12 May colloquy between the military judge and the TDC, the judge remarked that the TDC must have perceived that there was some problem that the appellant was having in contacting civilian counsel. The TDC responded that he did not perceive such a problem. The judge then asked the TDC: "Well, is that because you thought that Staff Sergeant Oliver wasn't looking for a civilian counsel or because he had successfully found one?" The TDC answered, "The former, sir." We note that, a few

moments earlier, the TDC had objected to the judge's questions of the TDC about whether the appellant had sought the TDC's assistance in contacting civilian counsel. Nevertheless, the judge persisted in questioning the TDC about the appellant's efforts in contacting civilian counsel. Faced with persistent questioning by the military judge in an area the judge obviously viewed as non-privileged, the TDC dutifully answered in what appears to be a candid and straightforward manner. Record at 32-33.

Was the TDC's performance in this regard deficient? We think not. First, we are not aware of any rule of law or ethics which obliges defense counsel to affirmatively assist a client in finding another defense counsel if the accused does not seek assistance in doing so. Second, when faced with a trial judge who chose to question him, not the appellant, about the issue of retention of civilian counsel, the TDC answered to the best of his ability. Even if we were to find that the TDC was deficient in his handling of this delicate colloquy with the judge, we find that the appellant was not prejudiced thereby. As we have previously stated, the judge did not abuse his discretion in denying the appellant's second motion for a continuance, and we are persuaded that the responses of the TDC did not contribute in any significant way to the military judge's decision to deny the continuance request. Finally, the record is not clear that the appellant would have ultimately hired Mr. Holmes, even if the judge had continued the trial indefinitely.

As for the appellant's second assertion that his TDC

was deficient in failing to object to the admission of the NCIS report on fingerprints and handwriting in the travel claim package, we decline to "second-guess the strategic or tactical decisions made at trial by defense counsel." *United States v. Grigoruk*, 52 M.J. 312, 315 (2000); *United States v. Goode*, 54 M.J. 836, 850 (N.M.Ct.Crim.App. 2001). After careful consideration of the record, we think it is obvious that the TDC made a tactical decision not to make an objection. As explained in closing argument, the defense theory was that the appellant made the claim for an amount he believed he was entitled to receive, not that somebody else prepared and submitted the claim documents. Thus, there was nothing to be gained by objecting to the exhibits in question, particularly when the appellant confessed that he made and signed them.

Concerning the third complaint that the TDC failed to object to evidence that the appellant had invoked his rights during the NCIS interrogation, we find that the TDC was deficient. As we noted previously, this evidence is clearly inadmissible, and we can discern no possible strategic or tactical reason not to object. However, as discussed earlier, given the overwhelming prosecution evidence, we find that the appellant was not prejudiced by the TDC's deficiency.

The last specific assertion of ineffective assistance of counsel concerns the TDC's failure to raise the related issues of multiplicity and unreasonable multiplication of charges. We note that the military judge raised the issues before the court was assembled and invited the TDC to move for some relief as to the form of the

charges and specifications. Record at 64. The TDC declined to do so. The trial counsel then conceded that "some of them [referring to the charges and specifications] are pled in the alternative," and proposed reviewing the findings for possible multiplicity before proceeding to the presentence hearing. The military judge indicated a preference for conducting such a review before deliberations on findings, then tabled the issue until later. *Id.* at 65.

The next morning, the judge again raised the issue of multiplicity with respect to the original Charge I, violation of Article 80, attempted larceny of the funds claimed as part of the travel claim package, and Charge II, the conviction now before this court. During the discussion, which the TDC declined to join, the trial counsel and the judge referred to potential unreasonable multiplication of charges as well as multiplicity. The discussion of these issues ended when the trial counsel announced that the Government was withdrawing the attempted larceny charge. *Id.* at 67-68. Thus, only the Article 132, UCMJ, charge and its supporting specifications were tried. After the government rested its case on the merits, and the defense stated that it would not present any evidence, the judge asked the TDC if he wanted to raise an issue of multiplicity. The TDC declined to do so. *Id.* at 150. There was no further discussion of multiplicity or unreasonable multiplication of charges.

Even if we were to find that the TDC's actions were deficient, we find that his performance did not prejudice the appellant. As discussed below, there was no

unreasonable multiplication of charges. As to multiplicity, we will take appropriate corrective action. Given the lenient sentence imposed by the military judge, the appellant suffered no prejudice. This assignment of error is without merit.

Multiplicity and Unreasonable Multiplication of Charges

We read the appellant's brief as asserting that the specifications of making a false claim, presenting the same false claim, and using an altered lodging receipt in support of that false claim are multiplicious for findings. Assuming *arguendo* that the specifications state separate offenses under multiplicity analysis, the appellant then argues that they represent an unreasonable multiplication of charges. The Government concedes multiplicity as to making and presenting the false claim. We accept the Government's concession and find Specifications 1 and 2 to be multiplicious for findings. We find that the appellant presented a false claim. The appellant's act of making the false claim was included in his act of presenting the false claim. We will take appropriate corrective action in the decretal paragraph.

We next consider whether presenting the false claim was multiplicious for findings with making and using an altered hotel receipt in support of the false claim. While the statutory elements of these two offenses are similar (Compare MANUAL FOR COURTS-MARTIAL, UNITED STATES, (1995 ed.), Part IV, ¶ 58b, with *United States v. Teters*, 37 M.J. 370 (C.M.A. 1993)), we must also

consider the pleadings in determining whether these are separate offenses. *United States v. Weymouth*, 43 M.J. 329 (1995). Specification 2, which describes the presenting a false claim offense, says nothing about making and using a false lodging receipt. Specification 3 describes making and using of a false lodging receipt in support of the false claim. In comparing these two offenses, we find the President's explanation helpful:

> The offense of making a writing or other paper known to contain a false or fraudulent statement for the purpose of obtaining the approval, allowance, or payment of a claim is complete when the writing or paper is made for that purpose, whether or not any use of the paper has been attempted and whether or not the claim has been presented.

MCM, Part IV, ¶ 58c(3). We find that the pleadings and elements establish a completely separate offense under Specification 3.

Notwithstanding our finding of two separate offenses, we must now consider whether these two convictions represent an unreasonable multiplication of charges. Art. 66, UCMJ; *see United States v. Quiroz*, 55 M.J. 334 (2001); R.C.M. 307(c)(4), Discussion. Under *Quiroz*, we consider five factors in determining whether the multiplication of charges is unreasonable: (1) Did the accused object at trial that there was an unreasonable multiplication of charges and/or specifications; (2) Is each charge and specification aimed at distinctly separate criminal acts; (3) Does the number of charges and specifications misrepresent or exaggerate the

appellant's criminality; (4) Does the number of charges and specifications unreasonably increase the appellant's punitive exposure; and (5) Is there any evidence of prosecutorial overreaching or abuse in the drafting of the charges?

There was no objection or motion at trial. Each specification is directed at a distinctly separate criminal act. The number of specifications does not exaggerate the appellant's criminality. At this special court-martial, there was no increase in punitive exposure. Finally, there is no evidence of prosecutorial overreaching or abuse. The assignment of error lacks merit.

Conclusion

The findings of guilty to Specification 1 are set aside. We dismiss Specification 1. We affirm the findings as to Specifications 2 and 3. We have reassessed the sentence under the principles contained in *United States v. Cook*, 48 M.J. 434, 437-38 (1998), *United States v. Peoples*, 29 M.J. 426, 427-29 (C.M.A. 1990), and *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). Having done so, we affirm the sentence as approved on review below.

Senior Judge ANDERSON and Judge VILLEMEZ concur.